IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 297 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PRAVINCHANDRA DAHYABHAI

Versus

STATE OF GUJARAT

Appearance:

MR AD SHAH for Petitioner

Mr S P Dave, APP for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 22/06/2001

C A V JUDGEMENT

The petitioner above-named, has preferred this Revision Application under section 397 of the Code of Criminal Procedure, 1973, (for short, 'the Code') challenging the judgment and conviction orders recorded by the two courts below against him for offence

punishable under section 406 of IPC. The original informant had preferred a complaint on 25.8.88 before the learned Metropolitan Magistrate, Court No.19 at Ahmedabad which was referred for investigation under section 156 (3) of the Code to the concerned police station by the said Court. After conclusion of the investigation, a charge-sheet was filed before the said court for offence punishable under sections 420 and 406 of IPC. On receiving the charge-sheet, copies were supplied to the petitioner. Charge was framed for the aforesaid offences and after the conclusion of evidence, further statement of the petitioner was recorded and after hearing the parties, the learned Matropolitan Magistrate pronounced his judgment on 12.5.1993 under which the petitioner came to be acquitted for offence punishable under section 420 IPC in accordance with the provisions made in section 248 (1) of the Code. At the same time, the learned Magistrate convicted the petitioner for offence punishable under section 406 IPC in accordance with the provisions made in section 248 (2) of the Code and after hearing the petitioner on the quantum of sentence, the learned Magistrate directed the petitioner to suffer R.I. for three years and to pay fine of Rs.5000/- in default of payment of fine, the petitioner was directed to undergo further R.I. for 9 months.

2. The petitioner was dissatisfied by the aforesaid judgment and conviction order recorded by the learned Magistrate and he preferred criminal appeal No.19/93 before the learned City Sessions Judge at Ahmedabad. There the arguments were heard and the learned City Sessions Judge came to a decision that the judgment and conviction orders were legal and proper and he accordingly dismissed the said appeal of the petitioner by judgment and order dated 18.4.1994.

3. Feeling aggrieved by the said judgment and conviction order of the learned City Sessions Judge confirming the judgment and conviction order of the learned Metropolitan Magistrate as aforesaid, the petitioner has preferred this revision before this Court. It has been mainly contended here that the two courts below have committed serious illegality in convicting the petitioner for the aforesaid offence. That therefore, the judgment and orders of the two courts below are illegal and perverse and deserve to be set aside. The petitioner therefore, prays that the present revision be allowed and the judgment and orders of the two courts below be set aside and the petitioner be set at liberty forthwith.

4. On receiving the revision application, rule was issued and Mr S P Dave, learned APP has appeared in response to the service of rule. I have heard Mr A D Shah, learned Advocate for the petitioner and Mr S P Dave, learned APP for the State. I have also gone through the judgments of the two courts below. In fact the learned Advocates for the parties have taken me through these two judgments in order to have appreciation in respect of the points advanced by them, during the course of arguments. The main and substantial ground of attack raised by the learned Advocate for the petitioner is that the judgment of the trial court is basically illegal, inasmuch as the petitioner has been convicted for offence punishable under section 406 of IPC. Mr A D Shah, learned Advocate has argued that there is no entrustment of the property and in absence of entrustment of property, there could not be any misappropriate and consequently there could not be any criminal misappropriation in respect thereof and consequently, there could not be a conviction against the petitioner for offence punishable under section 406 of IPC. It is, therefore, his contention that the judgments and orders of the two courts below are illegal and therefore, they deserve to be set aside.

5. In order to appreciate the aforesaid arguments advanced on behalf of the petitioner, it would be relevant to consider the facts of the case in a brief manner. It can be gathered from the judgment of the two courts below that a scheme was floated namely; Ashoka Tenament Scheme in Ghodasar area of Ahmedabad. The original informant and the complainant joined as a Member in the said scheme. He was allotted block No.A-17. The original complainant had paid in all an amount of Rs.64,755/- to the petitioner. However, on an enquiry, the petitioner came to know that the aforesaid block had already been allotted to another person. Thereafter, the original complainant requested the petitioner for allotment of another block at which the petitioner turned his face away meaning thereby that the petitioner did not agree for allotment of any block to the complainant. Therefore, according to the complainant, he lost the aforesaid amount and did not get any block in the said scheme. Therefore, he filed the aforesaid complaint which came to be diverted to the police station for investigation under section 156(3) of the Code which ultimately resulted in submission of charge-sheet against the petitioner.

6. Let us take that the aforesaid facts are totally true and there is no dispute about the same. Moreover,

this is a revision petition and, therefore, it would not be possible for this court to enter into the factual aspect. It would also not be possible for this court to re-appreciate in evidence unless it is shown that the appreciation of evidence is manifestly illegal and is eminently opposed to the evidence on record. Keeping these principles in mind, I propose to dispose of the legal contention raised by Mr A D Shah, learned Advocate for the petitioner that this was, as per the case of the original complainant, a matter, in which the aforesaid amount was parted by the original complainant in favour of the petitioner by way of part payment towards the sale of an immovable property. In other words, the amount paid by the original complainant to the petitioner was said to be an amount of consideration for sale of the property on the said basis. Mr A D Shah, learned Advocate has argued for the petitioner that this being an amount of consideration for sale, it did not amount to entrustment of property and when there is no entrustment of property, there could not be an offence punishable under section 406 of the IPC.

7. It would be appropriate to consider the provisions made in section 406 of IPC which says that whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

8. This means that in order to record a conviction for offence punishable under section 406 IPC, it would be necessary for the prosecution to prove that the accused has committed criminal breach of trust. In order to appreciate the said provision, it would also be necessary to consider the provisions made in section 405 of IPC, which defines criminal breach of trust as follows:

> "405. Criminal breach of trust - whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".

9. On going through the provisions made in section 405 of IPC, it is very clear that before a criminal

breach of trust can be said to have been committed by the accused person, it is obligatory on the part of the prosecution to prove that there was some property in respect of which a trust was created and the property was entrusted or handed over to the accused person. The question is as to whether a payment made by the original complainant to the present petitioner towards the sale of an immovable property could be treated to be an entrustment. Since if, there is no entrustment, there could not be a criminal breach of trust and if there is no criminal breach of trust, there could not be conviction under section 406 of IPC.

10. In this connection, it is necessary to consider a decision of the Supreme Court in the case of State of Gujarat v. Jaswantlal Nathalal, reported in AIR 1968 SC 700. The facts of the said case can be narrated briefly as follows:

The State of Gujarat gave a contract to Bharat Sewak Samaj (Gujarat) for the work of construction of a building for the government litho-printing press. The said Bharat Sewak Samaj, in its turn gave away that work on sub-contract to a firm and as per the contract, the Government had to supply cement to the contractor. Accordingly, an application was made to the Government for allotment of 10 tons of cement. In response to the said application, the Dy. Engineer allotted 5 tonnes (100 bags) of cement and the same was delivered to the respondent for and on behalf of Bharat Sewak Samaj on 10.4.1962 and this fact was undisputed in the said matter. Then, it is further borne out from the said matter that as per the case of the prosecution, after taking delivery of 100 bags of cement, the respondent delivered at the site 60 bags of cement and the remaining 40 bags were sent by the respondent to the Godown of Tayabali. This fact was also not at dispute in the said matter. On the aforesaid matter, the prosecution alleged that the respondent concerned committed criminal breach of trust in respect of 40 bags of cement. The prosecution alleged in the said matter that the entire lot of 100 bags of cement was required to be used in the said construction work and transfer of 40 bags of cement to the said prosecution witness Tayabali amounted to criminal breach of trust and, therefore, it was alleged that the respondent had committed an offence punishable under section 409 of IPC. The only difference is that under section 406, an offence can be committed by any person, who has been entrusted a property and who has committed criminal breach of trust in respect of that property. As against this, an offence under section 409

can be committed by an accused person, who should be a public servant and the property should have been entrusted to him in his capacity as public servant. Rest of the ingredients of this offence are identical to those found in section 406 of IPC. On appreciation of legal aspects of the case, the Apex Court has observed in the aforesaid matter that it is difficult to accept the contention of the appellant-State of Gujarat since after the sale of the cement bags in question, the Government had no proprietory right over the same nor can it be said that the transaction in question resulted in any relationship either between the government and Bharat Sewak Samaj (for short, 'BSS') or between the government and the respondent. It was a normal transaction of sale though the sale in question was effected by the government on the representation that cement was required for a particular purpose. The Supreme Court has further observed in para 8 of the judgment the term "entrusted" found in section 405 of IPC governs not only the words "with the property" immediately following it but also the words "or with any dominion over the property" occurring thereafter. It has also been observed that before there can be any entrustment there must be a trust, meaning thereby, an obligation annexed to the ownership of property and a confidence reposed in and accepted by the owner. It has also been observed that after delivery of the cement, the Government had neither any right nor dominion over the same. That if the purchaser or his representative had failed to comply with the requirements of any law relating to cement control, he should have been prosecuted for the same. But we are unable to hold that there was any breach of trust. Therefore, it is very clear that before the property can be said to have been entrusted to the accused person, it would be necessary for the prosecution to prove that the complainant continued to be the owner and proprietor of the property which is said to have been entrusted to an accused person. In other words, the proprietory rights in respect of the property should continue to be with the complainant and even the complainant should be continued to be in constructive possession of the property entrusted to the accused person.

8. Another decision referred to by the learned Advocate for the petitioner is in the case of Common Cause, a Registered Society v. Union of India, reported in AIR 1999 SC 2979, which is a very lengthy judgment and the relevant portion can be gathered from page 3023. In para 158 of the judgment, the Supreme Court has referred the provisions of section 405 of IPC. Then in para 159, the Supreme Court has observed as follows:

"A trust contemplated by section 405 would arise only when there is an entrustment of property or dominion over property. There has, therefore, to be a property belonging to someone which is entrusted to the person accused of the offence under section 405. The entrustment of property creates a trust which is only an obligation annexed to the ownership of the property and arises out of a confidence reposed and accepted by the owner. This is what has been laid in State of Gujarat v. Jaswant Lal Nathalal, AIR 1968 SC 700. In Rashmi Kumar v. Mahesh Kumar Bhada (1997) 2 SCC 397, the essential ingredients for establishing the offence of criminal breach of trust, as defined in s.405, have been spelt out as follows:

(i) entrusting any person with property or with any dominion over property,

(ii) the person entrusted dishonestly misappropriating or converting to his own use that property; or dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation of any direction of law prescribing the mode in which such rust is to be discharged, or of any legal contract made touching the discharge of such trust.

160. In this case, the earlier decision in Pratibha Rani v. Suraj Kumar (1985) 2 SCC 370 was affirmed. The case essentially related to the entrustment of 'Stridhan' but nevertheless, it is important, in the sense that the ingredients of the offence are set out and discussed. In Chellor Mankkal Narayan Ittiravi Nambudiri v. State of Travancore-Cochin, AIR 1953 SC 478, it was laid down that every breach of trust in the absence of mens rea or dishonest intention cannot legally justify a criminal prosecution.

161. The expressions "entrusted with property" and "with any dominion over property" used in section 405 came to be considered by this court in CBI v. Duncans Agro Industries Ltd, Calcutta (1996) 5 SCC 391:AIR 1956 SC 2452 and the view earlier expressed was reiterated. It was held that the expression "entrusted" has wide and different implication in different contexts and

> the expression "trust" has been used to denote various kinds of relationships like trustee and beneficiary, bailor and bailee, master and servant, pledger and pledgee."

Here also the Supreme Court has taken a view that the property must have been entrusted to the accused before he can be said to have committed offence of criminal breach of trust. As said above, the Supreme Court has observed that there has to be a property belonging to someone which is entrusted to the person accused of an offence under section 405 of IPC. As said above, in the present case, the aforesaid amount of Rs.64,755 was said to have been paid by the original complainant to the petitioner by way of consideration for the purchase of a block in Ashoka Tenaments and this could not be treated to be an entrustment of property. Once the amount of Rs.64,755/- had passed from the original complainant to the accused i.e. the petitioner, then the title of the property i.e. the aforesaid amount has passed on to the petitioner and the original complainant did not remain the owner or proprietor of the said money. In that case, it could not be said that the aforesaid amount of Rs.64,755/- was entrusted to the petitioner by the original complainant. Same way, the original complainant did not remain in constructive possession of the said amount since the title of the property i.e. the said amount, had already passed into the petitioner and once the title and the property is passed into the petitioner, it cannot be said to be a transaction, which can be termed as an entrustment of a property since in a case of entrustment of property, the basic requirement is that the person, who is entrusted with property, or with any dominion over property, remains the owner and also remains in constructive possession of the property. In that view of the matter, this being a transaction of sale, it could not be treated to be a case of entrustment of the aforesaid amount of Rs.64,755/- by the original complainant to the present petitioner.

9. Mr S P Dave, learned APP has argued at length that the transaction was incomplete, inasmuch as the petitioner had not provided a block to the original complainant and had not executed sale deed in respect of such a block in favor of the original complainant, and therefore, when the transaction was incomplete the amount may be treated to be an entrustment. It is difficult to agree with the aforesaid contention raised on behalf of the prosecution i.e. the State of Gujarat by the learned APP. The simple reason is that as soon as the amount of Rs.64,755/- was paid by the original complainant to the

petitioner, the title in the property, i.e. the amount had passed on to the petitioner and, therefore, simply because the transaction was incomplete and the sale deed was not effected, it would not change the nature of the transfer of money from one hand to another. In other words, simply because the sale deed was not effected and the transaction was incomplete, it would not be treated to be a matter of entrustment of property by the original complainant to the petitioner. In above view of the matter, looking to the transaction between the original complainant and the petitioner, I am of the opinion that this could not be technically treated to be a matter of entrustment and when there is no case of entrustment, there cannot be criminal breach of trust in respect of the property which is said to be entrusted by the original complainant to the petitioner.

10. In above view of the matter, I am of the opinion that the argument advanced by the learned Advocate for the petitioner is found to be acceptable, inasmuch as it has been argued that there was no entrustment and, therefore, there could not be any criminal breach of trust in respect of the said amount. MR A D Shah, learned Advocate has also argued that at the best, it may be an offence of cheating under Section 420 of IPC inasmuch as the petitioner can be said to have been deprived of allotment a block by false representation. He immediately argues that this court cannot convict the petitioner for an offence under section 420 of IPC since the petitioner has already been acquitted of the said charge by the learned Metropolitan Magistrate and no acquittal appeal has been preferred against the said order of acquittal against the petitioner. Here also Mr Shah appears to be right that when the petitioner has already been acquitted for offence punishable under section 420 of IPC by the learned Metropolitan Magistrate, it is not open for this court to consider as to whether or not the petitioner should be treated to be guilty for offence punishable under section 420 of IPC on the facts and circumstances and evidence on record. Therefore, it is not necessary for this court to express any opinion as to whether, in the given set of facts, the petitioner should be treated to be guilty of the offence punishable under section 420 of IPC. However, it goes without saying that so far as section 406 is concerned, the petitioner is entitled to technical benefit as said above. I am also of the opinion that the property in the aforesaid amount of Rs.64,755/- had already passed into the petitioner and therefore, the complainant could not be said to have been entrusted the said amount to the petitioner and consequently, it cannot be said that the

petitioner had committed criminal breach of trust by not allotting a block to the original complainant even after receiving such amount. In other words, the conviction recorded by the learned Metropolitan Magistrate in C.C. No.1126/92 and confirmed by the learned City Sessions Judge in Criminal Appeal No.19/93 is required to be quashed and set aside and the petitioner is required to be acquitted of the said charge and the fine if paid, is required to be refunded to the petitioner.

11. For the foregoing reasons and in the facts and circumstances of the case narrated hereinabove and considering the aforesaid technical defences, this revision is allowed and the judgment and conviction order recorded by the learned Metropolitan Magistrate, Court no.19, on 12.5.1993 in criminal case no.1126/92 as well as the judgment and order passed in Criminal Appeal No.19/93 dated 18.4.1994 recorded by the learned City Sessions Judge, Ahmedabad, both are set aside. The conviction recorded by the two courts below is also set aside and the petitioner is ordered to be acquitted of the offence punishable under section 406 of IPC. The fine shown to have been paid by him in a sum of Rs.5000/- before the Metropolitan Magistrate Court as per the endorsement dated 12.5.1993 below the judgment of the Metropolitan Magistrate Court, shall be refunded to the petitioner. The bail bonds of the petitioner stand cancelled.

Date:22.6.2001 [D P Buch, J.]
msp